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14 Fiduciary of Employers Mutual Plans

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF NEVADA**

17 Thomas A. Dillon, Independent Fiduciary
18 of Employers Mutual Plans,

19 Plaintiff,

20 v.

21 James Graf, et al.

22 Defendants.

CASE NO. CV-N-03-0119-HDM-VPC

**PLAINTIFF's OPPOSITION TO
OBJECTIONS TO DISCOVERY**

Date: July 23, 2003

Time: 9:00 a.m.

Dept.: One

Magistrate: Judge Valerie P. Cook

23 Plaintiff, Thomas A. Dillon, as the court appointed Independent Fiduciary of the
24 thousands of Employee Welfare Benefit Plans, submits this opposition to the objections to
25 discovery filed by defendants:

26 Gary Bastie
27 Anthony DiRienzo
28 Edward Farley
James Lang
William Starling

Filed concurrently herewith is the Declaration of Robert L. Brace

PLAINTIFFS' OPPOSITION TO OBJECTIONS TO DISCOVERY

I.

SUMMARY OF DEFENDANTS' OBJECTIONS

Defendants Gary Bastie, Anthony DiRienzo, Edward Farley, James Lang and William Starling (hereinafter referred to as the "Objecting Defendant Insurance Producers") have filed several objections with the Court which (i) substantively attack Plaintiff's Complaint and (ii) procedurally object to Judge McKibben's Order compelling Defendants to respond to interrogatories before allowing defendants to file Motions to Dismiss. The Objecting Defendant Insurance Producers' substantive arguments, which should be made pursuant to Federal Rules of Civil Procedure, Rules 12 and 56, can be recharacterized as follows:

(1) ERISA applies to the Defendant Insurance Producers' conduct and ERISA pre-empts state law. Therefore, Dillon does not have state law based causes of action for breach of contract, negligence or breach of warranty of authority against the defendant Insurance Producers.

(2) Judge Hagan's Order of February 1, 2002 in Chao v. Graf, et al., Case No. CV-N-01-0698 - DWH-RAM holds the present Civil Proceeding in "abeyance".

(3) The case must be dismissed because there is no evidence of unpaid claims or injured parties.

(4) Dillon is precluded from suing the Objecting Defendant Insurance Producers because two state court cases have been filed and dismissed as against these defendants.

II.

SUMMARY OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' OBJECTIONS

Procedurally, Judge McKibbens is in control of this case. The Court has complete authority to control the Order of discovery and the timing of motions.¹ Judge McKibben

¹Although not without limits, the court's express and inherent powers enable the judge to exercise extensive supervision and control of litigation. The Federal Rules of Civil Procedure, particularly Rules 16, 26, 37, 42, and 83, contain numerous grants of authority that supplement the court's inherent power to manage litigation. Fed. R. Civ. P. 16(c)(12) specifically addresses complex litigation, authorizing the judge to adopt "special procedures for managing potentially difficult protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."

1 ordered the defendants to respond to the interrogatories within 45 days after service of the
2 Complaint which the defendants have failed to do. The defendants are entitled to file motions
3 to dismiss at a date to be set at the Initial Pre-Trial Conference which is on August 26, 2003.
4 The defendants have cited no authority for the proposition that Motions to Dismiss must be
5 heard before discovery is due.

6 The first objection raised by defendants contends that ERISA pre-empts state law in this
7 case. Substantively, the defendants are in error. An Employee Benefit Welfare Plan ("EWPB")
8 is created when an employer agrees to purchase health insurance for his or her employees as
9 a benefit of employment. Once the EWPB is created, ERISA governs the relationship between
10 the ERISA entities. The ERISA entities are the employer (Plan Sponsor), the fiduciaries of
11 EWPB and the beneficiaries of the trust or Participants of the Plan. ERISA does not govern the
12 relationship between the EWPBs and third parties who contracted to provide services to the
13 EWPBs. State law governs this relationship and state insurance laws controlled the
14 transactions whereby the Defendant Insurance Producers solicited and sold defective health
15 insurance to the EWPBs.

16 Defendants second objection argues that Judge Hagan's Order of February 1, 2002 in
17 Chao v. Graf, et al. bars the commencement of this action due to the imposition of a stay.
18 Defendants are misguided. That very Order gave Dillon standing and expressly authorized
19 him to file the subject action against the Objecting Defendant Insurance Producers.

20 Defendants third objection asserts that this action is to be dismissed for lack of
21 evidence. For purposes of a 12(b)(6) Motion to Dismiss, the allegations in Dillon's Complaint
22 that the Objecting Defendant Insurance Producers sold the defective insurance and there are
23 unpaid claims attributable to their sales must be assumed by the Court to be true. The
24 Declaration of Robert L. Brace provides further proof that the allegations are true. Defendants
25 have not filed any evidence to rebut this evidence and the objections to discovery are not the
26 proper procedure to raise this issue or resolve it.

27 Defendants' final objection asserts that the suit is precluded by earlier Judgements of
28

1 dismissal. As shown in the Declaration of Robert L. Brace, the defendants were properly
2 dismissed from the State Court litigation filed in Florida because the cause of action pursued
3 by the Plaintiff belonged to Dillon, and not the Plaintiff who filed the action. In addition, the
4 Plaintiff who filed the action did not purchase her insurance from the Objecting Defendant
5 Insurance Producers so there was no privity of contract or duty owed to that Plaintiff by these
6 Defendants. Dillon is not precluded from suing the Objecting Defendant Insurance Producers
7 in this Civil Proceeding because these same defendants were dismissed in other proceedings.

8 III.

9 **DILLON'S STATUS AS INDEPENDENT FIDUCIARY MAKES HIM THE PROPER** 10 **PARTY TO BRING THE CIVIL PROCEEDING AND JUDGE HAGAN EXPRESSLY** 11 **AUTHORIZED DILLON TO FILE IT**

12 On December 12, 2001, Elaine Chao, the Secretary of the United States Department
13 of Labor, filed a complaint in the United District Court for the District of Nevada against,
14 among others, James Graf for ERISA violations in the matter entitled Chao v. Graf, et al., Case
15 No. CV-N-01-0698-DWH-RAM (hereinafter referred to as the "ERISA Proceeding").

16 On December 13, 2001, in the ERISA Proceeding, the United States District Court
17 appointed Thomas A. Dillon as the Independent Fiduciary of the Employers Mutual Plans with
18 the authority "to pursue all legitimate claims . . . the Employers Mutual Plans may have against
19 third parties which, in his judgment, are likely to result in a meaningful recovery of assets to
20 pay participant claims or the costs of administration."

21 The Employers Mutual Plans are the thousands of individual EWBP's created by the
22 individual employers when they agreed to provide medical, surgical and hospital care
23 benefits to their respective employees and beneficiaries (hereinafter referred to as
24 "Participants") by purchasing the health insurance sold by the Defendant Insurance Producers.

25 On February 1, 2002, in the ERISA Proceeding, the United States District Court ordered
26 that Plaintiff Thomas A. Dillon "shall continue to serve as the Court's Independent Fiduciary
27 of the Employers Mutual Plans with plenary authority to administer said entities" and that
28

1 Thomas A. Dillon "shall collect, marshal, and administer the assets of . . . the Employers
2 Mutual Plans including those sums owing and payable to them, process the Employers Mutual
3 Plans' unadjudicated claims and pay those which are found to be legitimate, identify all
4 creditors of the entities and the amount of their claims, and take such further actions with
5 respect to said entities which may be appropriate. The Independent Fiduciary shall exercise
6 full authority and control with respect to the management or disposition of the assets of the
7 Employers Mutual Plans . . . [T]he Independent Fiduciary is authorized to pursue all legitimate
8 claims . . . the Employers Mutual Plans may have against defendants or third parties which,
9 in his judgment, are likely to result in a meaningful recovery of assets to pay participant claims
10 or costs of administration. The Independent Fiduciary's authority includes the authority to
11 seek relief in this Court under the All Writs Act, 28 U.S.C. §1651 [and] to obtain quasi-
12 bankruptcy protection for the Employers Mutual Plans if appropriate."

13 On April 30, 2002, in the ERISA Proceeding, the United States District Court, exercising
14 its equitable jurisdiction over the Employers Mutual Plans, their respective participants and
15 beneficiaries, as well as over the creditors of the EWBP's, entered an Order Establishing a
16 Quasi-Bankruptcy for the thousands of Employers Mutual Plans. The Court imposed a quasi-
17 bankruptcy proceeding for the equitable dissolution of the EWBP's and their assets, which is
18 an equitable bankruptcy remedy to ensure that the equitable policies underlying ERISA are
19 satisfied. See Cutler v. The 65 Security Plan, 831 F. Supp. 1008, 1022-23 (E.D.N.Y. 1993);
20 All Writs Act, 28. U.S.C. §1651; and SEC v. Gould, 622 F.2d 1363 (1980).

21 In the Order Establishing the Quasi-Bankruptcy, the United States District Court created
22 the following categories of creditors of the Employers Mutual Plans (hereinafter collectively
23 referred to as "Creditors"):

24 a. The Independent Fiduciary, his attorneys, actuaries, accountants, consultants
25 and other professional service providers retained by the Independent Fiduciary who have
26 incurred or will incur fees or wages on or after December 13, 2001 ("Administrative
27 Creditors");

1 b. The Participants and beneficiaries of the EWBP's who have paid out-of-pocket
2 for medical and health claims, other than co-payments and deductibles, that should have been
3 paid by the alleged insurance purchased by the Employers Mutual Plans ("Category A
4 Creditors");

5 c. The medical and health providers of the participants of the Employers Mutual
6 Plans ("Category B Creditors");

7 d. All other service providers of the Employers Mutual Plans ("Category C
8 Creditors"); and

9 e. Any other remaining obligations of the Employers Mutual Plans ("Category D
10 Creditors").

11 In the Order Establishing the Quasi-Bankruptcy, the United States District Court
12 reconfirmed the powers granted the Independent Fiduciary in the Court's Order filed on
13 February 1, 2002 and reiterated that the Independent Fiduciary had "the power and duty to
14 take any and all actions necessary and proper to fully effectuate" the Court's Order, including,
15 without limitation, "the responsibilities to initiate, defend and settle litigation" on behalf of the
16 EWBP's.

17 In the Order Establishing the Quasi-Bankruptcy, the United States District Court ordered
18 that assets of the thousands of Employers Mutual Plans recovered by the Independent
19 Fiduciary through litigation against third parties shall be distributed and the priority of payment
20 to Creditors shall be as follows:

21 a. Administrative Creditors shall have first priority and shall be paid 100 percent
22 of their claims;

23 b. Category A Creditors shall have second priority and, as funds permit after
24 payment of the Administrative Creditors, shall be paid 100 percent of their claims;

25 c. Category B and Category C Creditors shall receive pro rata distribution of the
26 funds remaining after payment of the Administrative and Category A Creditor claims; and

27 d. Category D Creditors shall receive pro rata distribution of the funds remaining
28

1 after payment of the Administrative and Category A, B, and C Creditor claims.

2 Pursuant to the Order Establishing the Quasi-Bankruptcy, the United States District
3 Court ordered that after the final pro rata distribution was made, the Court shall then issue a
4 permanent injunction barring any adverse actions against the Employers Mutual Plans and
5 their Participants by any and all Creditors for claims associated with defective health coverage
6 purchased by the Employers Mutual Plans for their respective Participants, and otherwise
7 discharging those claims.

8 On March 3, 2003, this lawsuit was filed in the United States District Court for the
9 District of Nevada by the Independent Fiduciary against approximately 400 defendants
10 alleging, among other things, that when the Defendant Insurance Producers sold the defective
11 health insurance to the thousands of EWPBs they: (i) breached their contracts to procure
12 insurance, (ii) committed malpractice and (iii) breached their warranty of authority as agents.
13 This action entitled Thomas A. Dillon, as Independent Fiduciary v. James Graf, et al., Case
14 No. CV-N-03-0119 HDM-VPC is referred to as the "Civil Proceeding."

15 IV.

16 DILLON'S CIVIL PROCEEDING AGAINST THE DEFENDANT INSURANCE 17 PRODUCERS IS BASED UPON STATE LAW, NOT ERISA

18 A. ERISA Does Not Pre-empt State Law Negligence Actions Against Professionals 19 Who Provide Services to an EWBP.

20 Insurance Producers are generally considered to be agents of the insureds. Boulton v.
21 Phoenix Worldwide Industries, Inc., 698 So. 2d 1248 (Fla. 3d DCA 1997). In this Civil
22 Proceeding the insureds are the EWPBs who purchased health insurance for their respective
23 Participants. Congress did not intend ERISA preemption to extend to state law tort claims
24 brought against Insurance Producers who sold insurance to EWBP. Morstein v. National
25 Insurance Services, Inc., 93 F.3d 715 (11th Cir. 1996).

26 When a state law claim brought against a non-ERISA entity does not affect relations
27 between principal ERISA entities, then the claim is not pre-empted by ERISA. As a corollary,
28

1 actions that affect the relations between EWPB entities, on the one hand, and outside parties,
2 on the other hand, similarly escape preemption. Airparts Company, Inc. v. Custom Benefit
3 Services of Austin, Inc., 28 F. 3d 1062, 1065 (10th Cir. 1994). The Insurance Producer is not
4 an ERISA entity. ERISA entities are the employer, the plan fiduciaries, and beneficiaries under
5 the plan. Morstein, at 722-723.

6 In the case at bar, the ERISA entities (the employer, the plan, the plan fiduciaries, and
7 the beneficiaries) are all united with Dillon in his efforts to secure redress from the
8 incompetent Insurance Producers. As stated by the 10th Circuit:

9 "A recovery from defendants will increase the coffers of the plan; a defeat will
10 mean that the plan has expended money in fruitless litigation. Such a tangential
11 effect, however, is not enough to relate these state law claims to the plan itself."
Airparts, at 28 F. 3d 1066.

12 The third circuit in Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price
13 Waterhouse, 879 F. 2d 1146, 1153 (3rd Cir. 1989) observed:

14 "We feel that professional malpractice actions brought by a plan are directly
15 analogous to the situation in Mackey [Mackey v. Lanier Collection Agency &
16 Serv., Inc., 486 U.S. 825, 833 (1988)], and that, in the absence of an explicit
17 corresponding provision in ERISA allowing a professional malpractice cause of
action, Congress did not intend to preempt a whole panoply of state law in this
area." Id., at 1153.

18 Other Federal Court cases holding that malpractice actions against Insurance Producers
19 who sold insurance to EWBP's are not preempted by ERISA include: Giannetti v. Mahoney,
20 218 F.Supp.2d 8, (2002), and; Wilson v. Zoellner, 114 F.3d 713 (8th Cir. 1997).

21 B. Dillon's State Law Based Causes of Action Are For Breach of Contract, Negligence
22 and Breach of Warranty of Authority.

23 (i) Breach of Contract to Procure Valid Insurance

24 On the Breach of Contract claim, Dillon has the burden of proving by the
25 preponderance of the evidence all of the facts necessary to establish:

- 26 (1) The existence of a contract;
27 (2) The EWBP's performance on the contract;
28

1 (3) The Insurance Producer Defendants' failure to perform; and

2 (4) Damages caused by the breach.

3 A contract to procure insurance is created between an Insurance Producer and its
4 clients when the clients agree to purchase the insurance offered by the agent. Eddy v. Sharp,
5 199 Cal. App. 3d 858 (1988). An Insurance Producer breaches his contract with the insured
6 if he fails to obtain the insurance coverage requested by the insured which the Insurance
7 Producer agreed to procure for the insured. Ibid.

8 The clients of the defendant Insurance Producers were the individual EWBP's who were
9 seeking to purchase health insurance as a benefit of employment for their respective
10 employees. The EWBP's request to the defendant Insurance Producers for health insurance
11 coverage was an invitation to the defendant Insurance Producers to make an offer by
12 submitting a proposal for coverage. No contract comes into existence between the Insurance
13 Producer and the client until the EWBP accepts the offer of the Insurance Producer to procure
14 the requested coverage. An agreement to accept the policy offered is sufficient consideration.
15 Duncanson v. Service First, Inc., 157 So. 2d 696(Fla. 3d DCA (1963).

16 The Insurance Producer is liable for breach contract to procure insurance if at the time
17 the contract to procure insurance was entered into the Insurance Producer had no actual or
18 apparent authority to bind the insurer. The Insurance Producer must respond to damages to
19 the extent of the loss which would have been recoverable under the terms of the proposed
20 policy. Id., at 699.

21 As alleged in the Civil Proceeding, the EWBP's requested the defendant Insurance
22 Producers to procure coverage for their employees. The Defendant Insurance Producers
23 offered to obtain health insurance issued by Golden Rule (and other A-rated carriers) and the
24 EWBP's accepted the offer. At such time, a binding contract was formed obligating the
25 defendant Insurance Producers to obtain the coverage as outlined in their proposal. Dillon
26 contends that the defendant Insurance Producers breached the contract because they were not
27 authorized to bind Golden Rule (or the other A-rated carriers) and could not obtain the
28

1 coverage as promised. Id., at 699.

2 (ii) Insurance Producer Negligence

3 On the Claim for Insurance Producer Malpractice, Dillon must prove:

- 4 (1) The defendant Insurance Producers performed services for the EWBP's;
- 5 (2) The defendant Insurance Producers had a duty to perform the services
- 6 in a reasonably prudent manner with the care and skill ordinarily used
- 7 in like cases by reputable members of the same industry practicing in the
- 8 same locality under similar circumstances;
- 9 (3) Damages to the EWBP clients by the defendant Insurance Producers'
- 10 failure to use such care and skill.

11 State and Federal courts regularly have found that insurance agents can be held to

12 professional standards of conduct. *See, e.g., Moore v. Kluthe and Lane Insurance Agency,*

13 *Inc.*, 89 S.D. 419, 234 N.W.2d 260 (S.D. 1975)(an agent who holds himself out as being

14 qualified to procure insurance is required to exercise the particular skills reasonably to be

15 expected of one in that occupation); *Fiorentino v. Travelers Insurance Company*, 448 F. Supp.

16 1364 (E.D. Penn. 1978) (the duty owed by an insurance agent to an insured is to obtain the

17 coverage that a reasonable and prudent professional agent would have obtained under the

18 circumstances).

19 In Florida, the courts described Insurance Producers as advisors, law interpreters, and

20 the provider of the "best package" of insurance for their clients. *Pierce v. AALL Insurance,*

21 *Inc.*, 513 So.2d 160, 161 (1981). The courts however, refuse to recognize insurance agents

22 as professionals for statute of limitations purposes under its bright-line test. *Pierce v. AALL*

23 *Insurance, Inc.*, 530 So. 2d 84, 87-88 (Fla. 1988). Insurance Producers remain liable for

24 ordinary negligence when the improper rendering of the Insurance Producers services causes

25 damage to their client, the insured. *Bitz v. Ed Knox CLU & Associates, P.A.*, 721 So.2d 823

26 (Fla.3rd DCA 1998).

27 Whether the conduct of the defendant Insurance Producers in the case at bar is

28

1 measured by standards of ordinary care or a heightened standard set for professionals, the
2 conduct fell below what was required. As alleged in the complaint, the defendant Insurance
3 Producers failed to confirm that Golden Rule (or the other A-rated carriers) agreed to bind
4 coverage, they failed to confirm that James Graf was authorized by Golden Rule (or the other
5 A-rated carriers) to bind coverage, they failed to investigate Employers Mutual LLC, or
6 defendant Graf's sixteen (16) Nevada Associations, and they failed to obtain health insurance
7 from Golden Rule (or the other A-rated carriers) as they had promised.

8 (iii) Breach of Warranty of Authority as an Agent of a Principal

9 A cause of action for breach of warranty may be alleged against an agent who purports
10 to make a contract on behalf of a principal, and represents that he has the power to do so. In
11 McKnight v. Hialeah Race Course, Inc., 242 So.2d 478 (Fla.3d DCA 1970), the court quoted
12 the provision set forth in Restatement (Second) of Agency § 329 that such a representation by
13 an agent becomes a warranty:

14 "A person who purports to make a contract, conveyance or representation on
15 behalf of another who has a full capacity but whom he has no power to bind,
16 thereby becomes subject to liability to the other party thereto upon an implied
17 warranty of authority, unless he has manifested that he does not make such
18 warranty or the other party knows that the agent is not so authorized."
19 McKnight, at 480.

20 This action for breach of warranty of implied authority was first adopted by the Florida
21 Supreme Court in Tedder v. Riggin, 65 Fla. 153, 61 So. 244 (1913) where the Court said:

22 "An agent, purporting to act for and bind a principle whom he has no authority
23 to represent, is liable for breach of implied warranty or in tort to the extent of
24 any damages resulting to the other party from such misrepresentation of
25 authority." citing Groeltz v. Armstrong, 125 Iowa, 39, 99 N.W. 128.

26 On the claim for Breach of Warranty of Authority against the defendant Insurance
27 Producers Dillon must prove:

- 28 (1) That the defendant Insurance Producers represented to their respective
client EWBP's that they were authorized to sell health insurance issued
by Golden Rule (or the other A-rated carriers);

- 1 (2) That the client EWPBs relied upon the representations;
2 (3) That the defendant Insurance Producers were not authorized by Golden
3 Rule (or the other A-rated carriers) to sell the insurance; and,
4 (4) Damages to plaintiffs legally caused by the breach.
5

6 In the instant case, the EWPBs were solicited by with the defendant Insurance
7 Producers as they sought to provide their employees with health insurance. The defendant
8 Insurance Producers represented to the EWPBs that Golden Rule (or the other A-rated carriers)
9 would provide the appropriate insurance and that they were authorized to sell the insurance
10 as offered on their behalf. The EWPBs relied upon the representations to their detriment and
11 the representations were false.

12 **V.**

13 **THE DEFENDANT INSURANCE PRODUCERS INJURED**

14 **THE PARTICIPANTS OF THE EWBP's**

15 **A. Commission Sharing Arrangements.**

16 As noted in the Declaration of Robert L. Brace, Dillon has accumulated computer data
17 from various sources, including the wholesaler of the defective product, Associated Agents of
18 America, Inc. (hereinafter referred to as "AAA"). The data from AAA identifies each Insurance
19 Producer who sold the defective insurance to each EWBP as well as the commission sharing
20 arrangement between the retail Insurance Producer and his or her up line Insurance Producers
21 in privity of contract with the EWBP client.

22 From this data, Dillon can run reports on each insurance producer under AAA which
23 identifies the EWBP client as well as the employees of each EWBP client. The social security
24 numbers of each Participant are then used to link the unpaid claims of the participant first to
25 the employer, then to the retail Insurance Producer and ultimately to each intermediary
26 Insurance Producer involved in any given transaction of insurance involving the defective
27 purchase of health insurance.
28

1 B. Gross Unpaid Claims v. Adjudicated Unpaid Claims.

2 Plaintiff Thomas Dillon hired a third party claims administrator ("BMS") to adjust and
3 adjudicate the unpaid claims. There are approximately 10,000 claims that remain to be
4 adjudicated. The gross unpaid claims of those claims adjudicated to date total over
5 \$42,000,000.00. "Gross Unpaid Claims" are the amount billed the participants by the
6 providers without deductions for co-pay, yearly deductibles or preferred provider discounts.
7 BMS adjusted the "Gross Unpaid Claims" but did so by first deducting the preferred provider
8 discounts before making deductions for co-pay and yearly deductibles. Plaintiff intends to
9 readjust the claims and eliminate the deduction for preferred provider discounts because those
10 discounts no longer apply due to the failure to pay the claims in a timely manner.

11 C. The Gross Unpaid Claims Caused by the Sales by the Objecting Defendant
12 Insurance Producers.

13 Attached to the Declaration of Robert L. Brace are gross unpaid claims reports for the
14 sales by the Objecting Defendant Insurance Producers. The totals are:

<u>Defendant Insurance Producer</u>	<u>Amount of Attributable Unpaid Claims</u>	<u>Exhibit</u>
Gary Bastie	\$200,632.58	#1
Edward Farley	\$53,243.85	#2
James Lang	\$67,907.73	#3
William Starling	\$4,526,029.19	#4
Anthony DiRienzo	\$1,579.00	#5

21 VI.

22 THE JUDGMENT IN THE PRIOR LAWSUIT IN FAVOR OF THE
23 OBJECTING INSURANCE PRODUCERS HAS NO PRECLUSIVE
24 EFFECT IN THIS CIVIL PROCEEDING

25 A. Muniz v. Employers Mutual, L.L.C., et al.

26 The Objecting Defendant Insurance Producers submit to this Court a final Judgment of
27 Dismissal in a case entitled Debra L. Muniz, et al. v. Earl Grant Darbyson, et al., Case No.

1 CA02-00986AN pending in the Circuit Court for the 15th Judicial Circuit, in and for Palm
2 Beach County, Florida (hereinafter the "Muniz Class Action"). The Muniz Action Judgment
3 of Dismissal was entered in favor of the Objecting Defendant Insurance Producers, without
4 class certification because: (i) Debra Muniz bought her defective insurance from Earl Grant
5 Darbyson and not from the objecting defendant Insurance Producers so there was no privity
6 of contract or duty owed to the Plaintiff and (ii) the court was put on notice th at Thomas
7 Dillon was appointed Independent Fiduciary with the sole authority to pursue the Objecting
8 Defendant Insurance Producers for malpractice. (Declaration of Robert L. Brace, ¶ 6, Exhibit
9 6). Thomas Dillon stands in the shoes of those EWPB's that purchased the defective insurance
10 from the Objecting Defendant Insurance Producers and therefore he does have privity of
11 contract and standing to sue the defendants for malpractice.

12 B. Kemmerer v. N.A.P.T., et al.

13 The defendant Insurance Producers also submit to this court a Final Order of Dismissal
14 with Prejudice in a case entitled Jeannie Kemmerer, et al. v. N.A.P.T., et al., Case No, 01-
15 4775A1 pending in the Circuit Court for the 15th Judicial Circuit in and for Palm Beach
16 County, Florida (hereinafter the "Kemmerer Action"). The Kemmerer Action involves a
17 completely different health plan than the one involved in the case at bar and therefore has no
18 relevance or res judicata effect to the Civil Proceeding brought by Dillon.

19 **VII.**

20 **THE COURT ORDERED THE SUBJECT DISCOVERY**

21 Attached to the Declaration of Robert L. Brace as Exhibit 7 is an Order from Judge
22 McKibbens in the Civil Proceeding which was filed on March 26, 2003. The Order
23 specifically demands that the defendants answer the interrogatories within forty-five (45) days
24 after service of process. The Order reads as follows:

25 "Within 45 days after service of process on a defendant, said defendant shall
26 provide to plaintiff's counsel a list of all clients who purchased the subject
27 insurance by or through said defendant, as well as a list identifying all insurance
28 producers who participated in each transaction. The limited discovery allowed
is that set out in Attachment B to this Order."

1 The discovery is relevant and necessary. Defendants are in violation of Court Order.
2 Judge McKibbens has complete authority to manage the affairs of his courtroom including the
3 ability to dictate schedules regarding discovery and motions.

4 **VII.**

5 **ALL MOTIONS ARE STAYED IN THE CIVIL PROCEEDING**

6 As noted on page four (4) of Judge McKibbens Order, all motions are stayed.
7 Defendants objections, which should be made by way of motion, are also in violation of
8 Court Order and should be overruled as such.

9 **VIII.**

10 **CONCLUSIONS**

11 The Court should overrule defendants' objections. Defendants should be ordered to
12 respond to the outstanding discovery forth with. Defendants will have the opportunity to raise
13 procedural and substantive arguments after the Initial Pre-trial Conference set for August 26,
14 2003.

15 DATED: 7/11, 2003

HOLLISTER & BRACE

17 By: 

18 ROBERT L. BRACE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 1126 Santa Barbara Street, Santa Barbara, California 93101.

On July 11, 2003, I served the foregoing documents described as **PLAINTIFF'S OPPOSITION TO OBJECTIONS TO DISCOVERY; DECLARATION OF ROBERT L. BRACE** on the interested parties in this action by placing

☐ the original ☒ a true copy thereof enclosed in sealed envelopes to the addresses on Page 2 attached hereto.


I caused such envelope to be deposited in the mail at Santa Barbara, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with Hollister & Brace's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 11, 2003, at Santa Barbara, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


SHELLEY J. CHORLTON

DILLON v. GRAF, et al.
SERVICE LIST, Page 1

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